

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF MUSCONGUS BAY AQUACULTURE FOR AN AQUACULTURE LEASE LOCATED IN THE DAMARISCOTTA RIVER, NEWCASTLE, LINCOLN COUNTY, MAINE))))))	FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION
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On April 29, 2005 Muscongus Bay Aquaculture of Bremen, Maine applied for an aquaculture lease totaling 8.77 acres in the coastal waters of the State of Maine, located in the Damariscotta River in Newcastle, Lincoln County, Maine. The applicant requested the lease for a term of ten (10) years for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using bottom culture techniques. The application was accepted as complete on April 29, 2005 and as amended on April 7, 2006. A public hearing on this application was held on June 7, 2006 at 6:00 p.m. in Newcastle. Intervenor status was granted to riparian landowner Daniel M. and Elaine G. Lerner Real Estate Trust.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that, taking into consideration the number and density of aquaculture leases in an area, the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area; significant wildlife habitat and marine habitat or the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna; or the public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site; that the lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and that the lease will be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

Evidence Introduced Concerning the Nature

and Impact of the Proposed Lease

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2) and the Department site report (Exhibit 3), and the record of the June 7, 2006 public hearing. At the public hearing, testimony was given by Tonie Simmons and Eric Peters, representing the applicant, the Department's Aquaculture Environmental Coordinator Jon Lewis, William Ferdinand, representing the intervenor, and four members of the public.

According to the application and the applicant's testimony, the proposed lease is sought to raise American oysters and European oysters on a lease site totaling 8.77 acres for a lease term of ten (10) years. The proposed lease activities would consist of growing shellfish on the bottom of the lease site. Oyster seed from the applicant's nursery lease site further upriver would be distributed on the bottom of the lease for grow-out. After approximately two years, when the oysters are market size, they will be harvested by either drag or by SCUBA diver. The applicant testified that dragging would occur on the site 1-3 days per week. Oysters would be cleaned and sorted on a 20' x 30' work barge moored over the lease area. Two 12' x 12' wet storage rafts would also be placed on the lease site from August to October. According to the application, the work barge would be located in close proximity to the shore and the dock off of Dodge Point Public Reserved Land. The wet storage rafts would be located south of the barge, in the middle of the western portion of lease site.

According to the applicant, noise will be minimal at the lease site. The drag boat would be use on the site 1-3 days per week and, according to the application, does not give off a noticeable sound. A power washer would be used to rinse the oysters when they are brought to the surface. According to the applicant, the washer is well-muffled and only runs for a few minutes for each load of product. The applicant does not plan to use lighting at the lease site. The barge and wet storage rafts planned for use on the site would be comprised of wood and would be low profile.

In accordance with Department regulations, 2.10(3), the applicant provided an environmental characterization of the proposed lease area. According to this environmental characterization, the proposed lease site is located in water depths ranging from 6-12 feet. The bottom is comprised of soft mud. Current speed is generally less than 1 knot and flows in a northwest/southeast direction. Additionally, the proposed lease site is not located within an Essential Habitat.

According to the application, there are seasonal docks and one mooring located in the area of the proposed lease. The proposed lease activities, according to the applicant, will not impede riparian access or access to the docks and mooring. Current uses of the proposed lease site include recreational fishing and kayaking. According to the application, those activities would not be excluded and are compatible with daily operations on the lease site. According to the application, there is one limited purposed aquaculture license (LPA) located within the lease boundaries. The applicant testified that they could work around the LPA and that they would agree to a condition on the lease allowing for the continuance of the LPA in the same location.

The Department's Aquaculture Environmental Coordinator (AEC) and his assistant conducted a site visit at the proposed lease area on August 3, 2005. During the site visit, a diver survey, utilizing an underwater video camera, was performed. The AEC created a site report summarizing the information obtained during the site visit and provided testimony at the hearing regarding the report. According to the AEC's report, the proposed lease is located in the Damariscotta River, adjacent to the Dodge Point Public Reserved Land owned by the State of Maine Department of Conservation. The water depths in the area of the proposed lease range from 11 to 17 feet at high water and 1 to 7 feet at low water. The bottom of the proposed site is comprised of soft mud. The currents in the area of the proposed lease are tidally driven in a northeast/southwest direction. According to the AEC's report, the proposed lease site is generally devoid of flora and fauna. The only flora observed was a common benthic diatom/algal mat. Primary faunal species that are likely found in the area include sand shrimp,

common periwinkle, rock crab and horseshoe crab. When questioned regarding the potential for dragging to break up and spread an invasive sea squirt that has been observed in the river, the AEC stated that the proposed lease activities would not greatly increase the risk of the spread of the species. According to the site report, the proposed lease site is not located within an Essential or Significant Wildlife Habitat.

According to the AEC, the proposed activities will not interfere with navigation or riparian ingress and egress. The proposed site is located along the western shore of the river, approximately 950 feet from the main navigational channel. The site is located immediately adjacent to the mudflats and approximately 75 feet from the uplands of the Dodge Point Public Reserved Land, and adjacent to the dock used to access the public land. Because the proposed lease activities would consist of bottom culture, there would be no surface gear, other than a work barge and wet storage rafts. Therefore, according to the AEC, there would be no interference with navigation from the proposed activities. Additionally, no moorings were observed within the general area of the proposed site.

According to the AEC's report, no fishing activity was observed within the boundaries of the proposed lease site during the site visit, although recreational fishing for striped bass is likely in the area. There are 5 aquaculture lease sites within one nautical mile of the proposed site. The closest lease site is located 500 feet from the proposed site and is also for the bottom culture of mussels with harvest by diver only. There are 2 LPAs located within the boundaries of the proposed lease site. According to the AEC's report the proposed lease is located in an area classified as open/approved for the harvest of shellfish by the Department's Water Quality Division. The AEC testified that the bottom of the lease site is very soft and therefore dragging the site could result in sediment rolling onto the beach at Dodge Point on an incoming tide. He recommended that the applicant only drag the lease area on an outgoing tide.

Dan Pritchard of the Department of Conservation, Submerged Lands Program, provided written comments regarding the proposed lease. He stated that the Department has no

objections to the proposed lease. He also stated that the project will not impact public use or boat access because the proposal is for bottom culture with no surface structures.

Paul Bryant, Harbormaster for Newcastle and Damariscotta provided written comments. According to Mr. Bryant, the proposed lease is not located within a designated channel; there is one mooring permitted within the proposed lease boundaries, but it is no longer in use; the proposed lease would not interfere with storm anchorages; and the proposed lease would not interfere with riparian access. Mr. Bryant stated that commercial and recreational fishing are minimal in the area. He noted that the divers should take appropriate safety precautions when diving near the Dodge Point dock.

William Ferdinand provided testimony on behalf of Intervenors Daniel and Elaine Lerner. He stated that the Lerner's have pending applications for a dock and six moorings for their six-unit subdivision. He testified that the Lerner's and the applicant signed a Memorandum of Understanding that states that the parties will support each other's applications. The MOU also states that the applications of both parties do not overlap and the activities would not interfere with each other, and that the closest point of the proposed lease would be approximately 300 feet from the proposed dock. Mr. Ferdinand testified that there would be approximately 100 feet between the mooring field and the proposed lease.

An assistant to the license holder of the LPA located within the proposed lease testified regarding the existing of the license within the boundaries. He requested that the condition on the lease reflect the exact location of the LPA.

Two local residents provided testimony regarding the proximity of the proposed lease to public land. They stated that Dodge Point is a heavily-used area and that a lease should not be located in front of this public land. They expressed concern about whether dragging will muddy the waters near a public swimming area.

An aquaculturist and hatchery owner on the Damariscotta River testified regarding the proposed dragging on the lease site. He testified that he has noticed an increase in the turbidity of the water in the river, as the amount of dragging on lease sites has increased on the river.

He requested that the proposed lease be harvested by diver only, or that the applicant be limited to dragging 1-3 days per week as stated in their testimony and application. He also noted that a mud plume brought up by a drag does not last very long, but that those who are using the beach on Dodge Point when the site is being dragged would likely complain.

Findings of Fact

The proposed lease site is located 950 feet west of the navigational channel of the Damariscotta River in water depths ranging from 11 to 17 feet at high water and 1 to 7 feet at low water. There are no active moorings located in the area of the proposed lease. The proposed lease site would be located approximately 300 feet from the intervenor's proposed dock and approximately 100 feet from the proposed mooring field. Whereas the barge and rafts will be the only surface gear, there will be ample room for navigation through the lease site and for riparian access. Based on this evidence, I find that the lease will not unreasonably interfere with navigation or the ingress and egress of riparian owners.

Recreational fishing for striped bass and kayaking occur in the area of the proposed lease. The area of the proposed lease is classified as open for the harvest of shellfish. The nearest aquaculture lease site is located 500 feet from the proposed site. The nearby lease is also for the bottom culture of oysters and the harvest method is by diver only. Additionally, there is a Limited Purpose Aquaculture License¹ located within the boundaries of the proposed lease. The LPA pre-existed the lease application and shall be permitted to continue in the same location. The applicant will conduct their lease activities around the LPA. Based on this evidence, I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

The bottom of the proposed site is comprised of soft mud. The proposed lease site is generally devoid of flora and fauna, except for a common benthic diatom/algal mat. Primary faunal species that are likely found in the area include sand shrimp, common periwinkle, rock crab and horseshoe crab. The currents in the area of the proposed lease are tidally driven in a

northeast/southwest direction and are less than 1 knot. The proposed lease site is not located within an Essential or Significant Wildlife Habitat. Based on this evidence, I find that the proposed activities will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna.

All seed shellfish will be obtained from Muscongus Bay Aquaculture in Bremen, Maine. Based on this evidence, I find that there is an available source of American and European oysters.

The proposed lease site is located immediately adjacent to the mudflats and approximately 75 feet from the uplands at the Dodge Point Public Reserved Land, which is used by the public for recreation and swimming. The harvest techniques proposed for the lease site are by drag and by diver. The bottom of the lease site is comprised of very soft mud which, if dragged on an incoming tide, could deposit mud on the beach and in the swimming area. Therefore, dragging on the proposed lease should only occur on an outgoing tide if there are people present on the beach or in the water at Dodge Point. Additionally, for the safety of the public and to ensure the full enjoyment of the Dodge Point Public Reserved Land, the proposed lease boundaries shall be modified to bring the lease site 100 feet out from the mud flats. The modification would result in a lease site of 6.53 acres with the following coordinates: 43° 59' 06.112" N, 69° 33' 57.000" W; 43° 59' 06.112" N, 69° 33' 54.900" W; 43° 59' 05.710" N, 69° 33' 53.978" W; 43° 59' 03.939" N, 69° 33' 52.816" W; 43° 59' 03.212" N, 69° 33' 50.900" W; 43° 59' 04.012" N, 69° 33' 43.000" W; 43° 59' 02.000" N, 69° 33' 43.000" W; 43° 59' 01.000" N; 69° 33' 57.000" W. Further, the proposed location of the 20' x 30' work barge is in close proximity to the shore and to the dock. The wet storage rafts are proposed in the center of the western portion of the site. In order to allow sufficient room for access to the dock, the work barge and wet storage rafts should be located along the western boundary of the lease site. Based on this evidence, taking into consideration the modifications to the boundaries and restrictions on

¹ At the time of the application, there were two LPAs located within the lease boundaries. However, one LPA was

harvesting and location of the surface structures, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency.

The only power equipment that would be use on the lease site would be a vessel for seeding and dragging and a power washer. The vessel is common on the river and would be use on the site 1-3 days per week. The power washer is well-muffled and would be used to rinse the oysters when they are brought to the surface. It only runs for a few minutes for each load of product. The applicant does not plan to use lighting at the lease site. Based on this evidence, I find that the proposed lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site.

The 20' x 30' work barge and two 12' x 12' wet storage rafts planned for use on the site would be comprised of wood and would be low profile. I find that the proposed lease will comply with visual impact criteria.

Conclusions of Law

Based on the above findings, taking into consideration the number and density of aquaculture leases in the area, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area;
4. The aquaculture activities proposed for this site will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of American and European oysters;
6. The aquaculture activities proposed for this site will not unreasonably interfere with

not renewed, thus leaving only one LPA within the boundaries of the lease.

public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency, provided that the applicant only drags the lease on an outgoing tide if there are people present on the beach or in the water at the Dodge Point Public Reserved Land and the work barge and wet storage rafts are located along the western boundary of the lease;

7. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and

8. The aquaculture activities proposed for this site will be in compliance with visual impact criteria.

Accordingly, the evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

Decision

Based on the foregoing, the Commissioner grants the applicant's requested aquaculture lease of 6.53 acres from the date of this decision for the purpose of cultivating American oysters (*Crassostrea virginica*) and European oysters (*Ostrea edulis*) using bottom culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant shall post a bond or establish an escrow in the amount of \$5,000 conditioned upon their performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

(1) Navigation and recreational boating and fishing shall be allowed on the open areas of the lease;

- (2) the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations Chapter 2.80;
- (3) When people are present on the beach or in the water at Dodge Point Public Reserved Land, the leaseholder shall not drag the lease site unless it is on an outgoing tide;
- (4) A Limited Purpose Aquaculture license shall continue to be permitted within the lease boundaries, as long as the LPA continues to meet DMR requirements for LPAs. The location of the LPA is identified by the geodetic coordinate Latitude 43°59.0525'N, Longitude 69°33.7900'W; and
- (5) The work barge and wet storage rafts shall be located along the western boundary of the lease site.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources